

Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer's "Foundational Attack"

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It is my submission that interest analysis is the preferred approach to choice of law because it works. In the real world, that is, in the conflicts cases that actually arise in practice, the use of the interest analysis approach generally will produce functionally sound and fair results. By functionally sound and fair results I mean results that are *acceptable* in the sense that they (1) do not produce unfairness to the litigants, and (2) do not require the application of the law of a state in circumstances in which such application would be considered objectively unreasonable.¹

Professor Brilmayer, in launching a "foundational attack" on the interest analysis approach, is not particularly concerned about how interest analysis works in practice or about the results that are produced by the application of that approach. In passing, she queries whether all the courts that have abandoned the traditional approach are in fact applying the interest analysis approach in practice²—a point that I believe cannot seriously be disputed³—and denies that "everyone is happy" with the results that have been produced by what she calls "policy analysis."⁴ However, neither in the present article nor elsewhere⁵ does she pay much attention to the results reached by courts in practice, nor does she attempt to show that the application of the interest analysis approach does not produce functionally sound and fair results in actual cases.

Rather, according to Professor Brilmayer, what is of primary importance is underlying theory and "foundations." She asserts and tries to demonstrate that "the

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1. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'*, 34 MERCER L. REV. 593, 635-41 (1983). I further submit that the proper role of the court in a conflicts case is to reach a functionally sound and fair result in the case before it. See *id.* at 597-99.

2. Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, (1985).

3. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181, 227-33 (1977). When I say that the courts are in fact applying the interest analysis approach in practice, what I mean is that the courts are reaching results that are consistent with the Currie version of interest analysis, regardless of which modern approach to choice of law they are purportedly following. Professor Leflar maintains that the courts "follow a pattern of multiple citation, seldom relying solely upon any single modern choice-of-law theory, but combining two or more of the theories to produce results which, interestingly, can be sustained under any or nearly all of the new non-mechanical approaches to conflicts law." Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. Spring, 1977, at 10. While the pattern of multiple citation does take place in practice, it is only the interest analysis approach that can consistently explain the results in these cases. This is why I contend that it is the interest analysis approach that the courts are in fact applying in practice. Neither Professor Brilmayer nor any other commentator has demonstrated that this is not so.

4. Brilmayer, *supra* note 2, at 460.

5. Professor Brilmayer's major attack on the interest analysis approach is contained in Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980).

foundations of interest analysis, as originally conceived, are fatally flawed."⁶ While suggesting that "interest analysis could perhaps be rebuilt if new foundations were provided,"⁷ she strongly implies that this cannot be done and that interest analysis must therefore be rejected as a tenable approach to choice of law.⁸

Professor Brilmayer has focused her attack on the "foundations of interest analysis, as originally conceived," referring to the interest analysis approach as it was originally developed and explicated by the late Brainerd Currie. Here, as elsewhere,⁹ she attacks what she says are the "major foundations" of Currie's interest analysis and tries to demonstrate deficiencies and inconsistencies in Currie's explanation and application of those foundations. As will be pointed out shortly, she has ignored the basic premise of Currie's interest analysis approach, which I believe to be the most important "foundation"--or what I prefer to call "justification"--for that approach as advanced by Currie. Be that as it may, it is not necessary for contemporary proponents of interest analysis to justify the interest analysis approach solely with reference to Currie's work. Currie's work is over 20 years old, and from the perspective of hindsight, we can see that Currie did not achieve complete perfection. It must be remembered that Currie developed interest analysis against the background of the traditional rules approach of the original Restatement of Conflicts of Law, which was being followed by all courts at that time. As an advocate for a completely different and revolutionary approach to choice of law, Currie sometimes fell into the familiar pitfalls of zealous advocacy. He tended toward overstatement on certain points,¹⁰ and was simply incorrect on others.¹¹ His tragically early death prevented him from further refining the approach he originated and developed.

But Currie's work is not the Koran, with the "gates of interpretation" having been closed sometime in the past.¹² And if I may mix my religious metaphors, Currie's work is not gospel either. Other commentators have built on Currie, have refined the interest analysis approach,¹³ and have viewed certain points differently than Currie did.¹⁴ A proper critique of the "foundations of interest analysis" should take account of the subsequent refinements of that approach and of the views of

6. Brilmayer, *supra* note 2, at 461.

7. *Id.* at 480.

8. Professor Brilmayer concludes: "We stand today just about where we stood when Currie finished the critical portion of his analysis: knee deep in metaphysical rubble from the earlier theory's foundations." Brilmayer, *supra* note 2, at 481. I find the term "tenable" particularly appropriate in referring to the validity of a basic approach to the resolution of choice of law problems. See Trautman, Sedler & Hay, *Reflections of Conflict-of-Laws Methodology: A Dialogue*, 32 HASTINGS L.J. 1609, 1610 (1981). (Addressing the question whether an approach would "create a tenable method for deciding choice-of-law issues").

9. Brilmayer, *supra* note 5.

10. Such as the political function rationale for forum preference in the case of the true conflict. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 182-83 (1963). See the discussion of this point in Sedler, *supra* note 1, at 637-38.

11. Such as his effort at constitutionalization. See *infra* notes 33-44 and accompanying text.

12. See, J. SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 69-75 (1964).

13. See, e.g., R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* §§ 6.2-.7, 6.32, 7.4-.6 (2d ed. 1980); Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 577 (1980); Sedler, *supra* note 1; Sedler, *supra* note 3; Weintraub, *Interest Analysis in the Conflict of Laws as an Application of Sound Legal Reasoning*, 35 MERCER L. REV. 629 (1984).

14. For example, the rationale for forum preference in the case of the true conflict. Compare B. CURRIE, *supra* note 10, at 77, 119-27, with Sedler, *supra* note 3, at 216-20, 227-33.

contemporary proponents of interest analysis.¹⁵ By fixating only on Currie's explanation of interest analysis, Professor Brilmayer has given herself a stationary target to shoot at, but she has also locked herself into a time warp.

Much more significantly, Professor Brilmayer's foundational attack ignores the basic premise of Currie's interest analysis approach, and what I believe to be the most important justification for that approach. The basic premise of Currie's interest analysis approach is accepted by all contemporary proponents of interest analysis—who are not as diverse a lot as Professor Brilmayer implies. That basic premise, as Professor Weintraub says, is that “the policies represented by domestic rules can be useful guides in resolving choice of law problems,”¹⁶ or, as I have put it, “that choice of law decisions [should] be made solely with reference to the policies reflected in the laws of the involved states and the interest of each state, in light of those policies, in having its law applied on the point in issue” in the particular case.¹⁷ That basic premise in turn is related to what I believe to be the most important justification for the interest analysis approach that Currie advanced: the rationality justification. Whatever else Currie may have said,¹⁸ he repeatedly justified interest analysis on the ground that it provided a rational basis for making choice of law decisions.¹⁹

According to Currie, it is rational to make choice of law decisions with reference to the policies reflected in the laws of the involved states, and the interest of each state, in light of those policies, in having its law applied on the point in issue in the particular case. Conversely, it is not rational to make choice of law decisions on the basis of a priori rules which are based solely on the factual connection between a transaction and a state and which ignore entirely policies and governmental interests.²⁰

I will return to the rationality justification and show that it is, to use Professor Brilmayer's term, the “foundation” on which the interest analysis approach may properly be considered to rest. I will also show the relationship between the rationality justification and the operation of the interest analysis approach in practice. But first I will deal with Professor Brilmayer's attacks on what she says are the “major foundations” of Currie's interest analysis approach.

One major foundation of Currie's interest analysis, according to Professor Brilmayer, is that it involves the “ordinary processes of statutory construction and interpretation,” and “attempt[s] to decide as the legislature would have decided had it addressed the issue.”²¹ She attacks this “foundation” by trying to show that

15. Professor Brilmayer does not do this. She simply says that none of the present-day proponents of interest analysis have answered her foundational criticisms. Brilmayer, *supra* note 2, at 462.

16. Weintraub, 46 OHIO ST. L.J. 493, 493 (1985).

17. Sedler, *supra* note 3, at 182.

18. Currie's work is quite voluminous. The best distillation of his views is found in Chapter 4, *Notes on Methods and Objectives in the Conflict of Laws*, in B. CURRIE, *supra* note 10, at 177–87.

19. See *id.* at 163–72, 178–84, 107–21.

20. B. CURRIE, *supra* note 10, at 146–52. This is because a factual connection does not necessarily give rise to an interest in having a particular rule of substantive law applied to a particular situation containing a foreign element. For example, in *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953), the plaintiff and defendant were from California, whose law allowed recovery. The accident occurred in Arizona, whose law did not. According to Currie, the application of Arizona law to deny recovery “would make no sense whatsoever.” B. CURRIE, *supra* note 10, at 151.

21. Brilmayer, *supra* note 2, at 463–64.

Currie's illustrative examples do not reflect the "ordinary process of statutory interpretation," and that as interest analysis operates under Currie's methodology, it is not designed to "further legislative purposes."²² Rather, she concludes, the policies that would be implemented under Currie's interest analysis are "the policies of a select group of choice of law scholars, not the policy choices of those legal institutions empowered to adopt and interpret state law."²³

As I have discussed more fully elsewhere,^{23a} Professor Brilmayer simply has got it all wrong.²⁴ Contrary to her assertion, proponents of interest analysis have not "marketed their theory as a species of legislative interpretation, indeed as the definitive approach to construing legislative intent."²⁵ Nor do they contend, again contrary to Professor Brilmayer's assertion, that "a rational legislature would, upon reflection, prefer the results of interest analysis to those of competing conflicts methodologies."²⁶ Interest analysis does not proceed on the assumption that it is a method of determining the legislature's intent whether or not a statute should apply to a particular situation containing a foreign element. It does not proceed on this assumption, because as Professor Brilmayer recognizes, there is no legislative intent in this regard.²⁷ Legislative intent is relevant in the choice of law context only when the legislature has manifested its intent as to the law's applicability to a situation containing a foreign element by a statutory directive or in some other demonstrable way.²⁸ In most cases, the legislature will not have manifested such intent one way or another, so legislative intent typically has no place in the choice of law process. This is equally true under the interest analysis approach.

Interest analysis involves the consideration of the policy behind a rule of substantive law, and the approach operates exactly the same way whether a statute or a common law rule is involved. When the rule of substantive law is statutory, interest analysis seeks to determine "legislative purpose" in the sense of ascertaining the objective that the legislature was trying to accomplish by the enactment of the statute.²⁹ The approach does not try to determine non-existent legislative intent regarding a statute's applicability to a particular situation containing a foreign element.

22. *Id.* at 468.

23. *Id.* at 472.

23a. Sedler, *supra* note 1, at 606-10.

24. *Id.* at 609.

25. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 392 (1980).

26. *Id.* at 393.

27. *Id.* She states: "In the vast majority of cases, legislatures have no actual intent on territorial reach" (emphasis in original).

28. See generally the discussion of legislative directives as to choice of law in R. SEDLER & R. CRAMTON, *SUM AND SUBSTANCE OF CONFLICT OF LAWS* § 3.2000 (2d ed. 1981). Where the legislature has imposed directives on the applicability of a statute to a particular situation containing a foreign element, the courts of the enacting state are bound by those directives. See the discussion in Sedler, *supra* note 1, at 609-10. Contrary to Professor Brilmayer's assertion, *supra* note 2, at 470, interest analysis does not mean ignoring statutory directives. Where there is a statutory directive, the courts of the enacting state must follow that directive, assuming that it is constitutional, and may not make a choice of law decision.

29. See Sedler, *supra* note 1, at 609. As to the determination of the policy reflected in a rule of substantive law, see the discussion in Sedler, *supra* note 3, at 194-201.

Currie referred to the "ordinary process of statutory construction and interpretation"³⁰ for the purpose of comparing the determination of law's applicability in a conflicts case and in a marginal domestic case. In both instances, the inquiry is directed toward ascertaining whether the policy reflected in the law will be advanced significantly by its application in the particular case.³¹ In a conflicts case, whenever the policy reflected in the law would be so advanced, the state is deemed to have an interest in having its law applied. But Currie did not contend that for this reason, the legislature "intended" that the law apply in the conflicts case.³² The legislature simply did not think about the matter, which is why a choice of law decision is necessary. And again, interest analysis operates exactly the same way whether a statute or common law rule is involved.

Interest analysis, then, is not premised on effectuating legislative intent. Professor Brilmayer cannot properly launch a foundational attack on interest analysis by asserting that it proceeds on a premise on which it does not in fact proceed.

The other major foundation of Currie's interest analysis that Professor Brilmayer attacks is Currie's effort at constitutionalization. Professor Brilmayer says that a crucial aspect of interest analysis is Currie's assertion that a choice of law is unconstitutional if it results in the application of the law of a state that does not have an "interest" (as defined by Currie) in having its law applied.³³ From this assertion Professor Brilmayer infers that a foundation of interest analysis is that it is constitutionally required.³⁴ She goes to great lengths to demonstrate that Currie's constitutional arguments are internally inconsistent and that interest analysis cannot be justified as an approach to choice of law on the basis that it is constitutionally required.³⁵

Suffice it to say that Currie was a much better conflicts scholar than a constitutional scholar. In his efforts to constitutionalize interest analysis Currie fell into one

30. This is brought out in the quotation from Currie's *Notes on Methods and Objectives in the Conflict of Laws*, that is cited by Professor Brilmayer *supra* note 2, at 463: "This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose." B. CURRIE *supra* note 10, at 183-84.

31. *Id.*

32. Professor Brilmayer also refers to a statement made by Currie in discussing the applicability of the Jones Act, 46 U.S.C. § 688 (1982) to a particular situation containing a foreign element. Brilmayer, *supra* note 2, at 463: "Like all statutory construction, such a decision is essentially legislative in character; the Court is trying to decide as it believes Congress would have decided had it foreseen the problem." B. CURRIE, *supra* note 10, at 606. Again, I do not think that Currie, by the use of this language, is suggesting that the United States Supreme Court should have tried to decide whether Congress "intended" the Jones Act to apply in this particular case. There is no evidence of Congressional intent one way or another. If there were, Congressional intent would resolve the statutory construction question. Since there is no evidence of Congressional intent, the Court "is trying to decide as it believes Congress would have decided had it foreseen the problem," *id.*, by considering whether the policy reflected in the law would be advanced by its application to this situation containing a foreign element. If the policy would be so advanced, then presumably Congress would have decided that the Act should apply had it foreseen the problem. But Congress did not foresee the problem, or in any event, it did not want to deal directly with the Act's applicability to situations containing a foreign element. Currie is saying that the Court should decide the question of the Act's applicability with reference to whether or not the policy reflected in the Act would be advanced by its applicability to the particular situation.

33. Brilmayer, *supra* note 2, at 465.

34. *Id.* at 465-66.

35. *Id.* at 472-77.

of the pitfalls of zealous advocacy: establishing a proposition and improperly inferring its converse.

The Supreme Court precedents on which Currie relied for his constitutional argument established the proposition that it was permissible for a state court to apply its own law on the basis of its interest in applying its law in order to advance the policy reflected in that law, and that a state was not constitutionally required to subordinate its own interest in favor of another state's.³⁶ Currie then argued that the converse of this proposition was that it was unconstitutional for a court to apply the law of a state in circumstances where the policy reflected in that law would not be advanced by such application.³⁷ The converse, however, does not follow.³⁸ The application of a state's law may be reasonable, and hence constitutional,³⁹ when such an application is premised on a basis other than the advancement of the policy reflected in that law. From a constitutional standpoint, it is reasonable for a state's law to be applied on the basis of factual connections between the underlying transaction and the state, regardless of whether or not the policy reflected in that law would be advanced by such application.⁴⁰ It is only where the application of a state's law cannot be sustained either on the basis of the state's interest in advancing the policy reflected in that law,⁴¹ or on the basis of factual connections between the underlying transaction and the state, that such application is unreasonable and hence unconstitutional.⁴² In short, the

36. The main cases on which Currie relied were *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954) (state where victim resided and harm occurred can allow a direct action against product manufacturer's insurer); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939) (state where worker was injured while temporarily there on employer's business can award worker's compensation); and *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935) (state where employment relationship was centered can award compensation to worker injured in another state).

37. Currie cited *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), as illustrative of this proposition, stating that, "[t]he decision supports the thesis of this paper since Texas had no legitimate interest in the application of its law and policy." B. CURRIE, *supra* note 10, at 232.

38. The application of Texas law in *Dick* to bar assertion of the built-in limitations defense available under Mexican law was violative of due process because Texas had neither a legitimate interest in applying its law on the point in issue nor factual contacts with the underlying transaction, a risk insurance contract between a nominal Texas resident and a Mexican insurer, covering a vessel only when used in certain Mexican waters. Since Texas neither had a legitimate interest in applying its law nor factual contacts with the underlying transaction, the application of Texas law was arbitrary and thus violative of due process. See also *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 309-11, (1981), and the discussion in Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59, 86-89 (1981).

39. As Professor Weintraub has observed: "Reasonableness is the basic, core concept of due process. Any further elaborations of this 'reasonableness' standard are attempts to give this vague standard more specific content in order to facilitate its application to specific cases." R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 505 (2d ed. 1980). See also Sedler, *supra* note 38, at 78-79.

40. See the discussion of this point in Sedler, *supra* note 38, at 78-79. See also *Carroll v. Lanza*, 349 U.S. 403 (1955) (state where injury occurred may allow nonresident employee to maintain common law tort action against general contractor, although employee was removed to his home state immediately after the accident and although law of home state provided that worker's compensation against employer was exclusive remedy for work-related injury).

41. This assumes application of the state's law on this basis would not be fundamentally unfair to the other party. The constitutional test necessarily incorporates fairness, since state action that interferes with the enjoyment of liberty and property interests in a fundamentally unfair way would be violative of due process. See Sedler, *supra* note 38, at 79-80.

42. In *Allstate*, *supra* note 38, the Brennan plurality stated the constitutional test as follows: "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 449 U.S. at 312-13. Justice Stevens took the position that a choice of law would be violative of due process only if it were totally arbitrary or fundamentally unfair, and specifically rejected the notion that the due process question was affected in any way by a state's interest in applying its law in order to implement the policy reflected in that law. *Id.* at

Constitution has been interpreted—and properly so⁴³—as imposing only the most minimal limitations on the power of state courts to make choice of law decisions. The Constitution thus accommodates both an approach to choice of law based on interest analysis and an approach to choice of law that ignores policies and interests entirely.⁴⁴

Contrary to Professor Brilmayer's contention, however, Currie's effort at constitutionalization is not a crucial aspect of interest analysis. A foundation of the interest analysis approach cannot be that interest analysis is constitutionally required, because it isn't. To the extent that Currie argued that it was, he was simply mistaken. No present-day proponent of interest analysis attempts to support interest analysis on the ground that it is constitutionally required, and to the extent Professor Brilmayer relies on Currie's effort at constitutionalization to demonstrate a foundational deficiency in interest analysis, she is merely caught up in a self-created time warp.⁴⁵

Professor Brilmayer's foundational attack on interest analysis thus turns out to be completely misplaced. She has challenged what she says are the two major foundations of Currie's interest analysis: (1) interest analysis is premised on effectuating legislative intent, and (2) interest analysis is constitutionally required. I believe I have succeeded in demonstrating that interest analysis is not premised on "effectuating legislative intent," and I certainly do not dispute that interest analysis is not constitutionally required. Furthermore, in launching her foundational attack on

331. While Justice Brennan's formulation refers to state interests, he appears to be using the concept of interest broadly to include the generalized interest of a state in applying its law on the basis of the factual contacts that the underlying transaction has with the state. See *id.* at 313–20.

43. This proposition is developed fully in Sedler, *supra* note 38.

44. The present status of constitutional limitations on choice of law, in the author's view, may be stated as follows: A state may not constitutionally apply its own law to a situation containing a foreign element when (a) it has no interest in doing so in order to implement the policy reflected in that law, or even if it has such an interest, the application of its law would be fundamentally unfair to the other party, or (b) it lacks sufficient factual contacts with the transaction so that it is unreasonable for it to apply its own law on this basis.

R. SEDLER & R. CRAMTON, *supra* note 28, § 13.1300.

For an illustrative situation in which the application of a state law was found unconstitutional see *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965 (1985) (application of Kansas law by Kansas state court to govern all claims involving gas leases in class-action cases, as applied to claims where gas leases and claimant had no connection with Kansas, was in violation of due process).

45. In her attack on Currie's effort at constitutionalization, Professor Brilmayer also faults interest analysis for failing to take account of fairness. She says that interest analysis "lack[s] an explanation of why it is fair to the complaining party to impose a law to which he or she objects," and that, "[i]f fairness is important, then it ought to be incorporated into all choice of law analyses, even the identification of false conflicts." Brilmayer, *supra* note 2, at 475–76. The short answer to this contention is that interest analysis does not, and constitutionally cannot, impose a law on a party when it would be unfair to do so. For this reason, fairness to the parties is incorporated into interest analysis. As I have stated many times, fairness to the parties is an independent choice of law consideration. "It should be noted, of course, that in any choice of law case, considerations of fairness to the parties is an independent value. A court will not make a choice of law decision that would be fundamentally unfair to either or both parties." Sedler, *supra* note 3, at 222. Likewise, a state cannot constitutionally apply its own law in any situation in which to do so would be fundamentally unfair to the party against whom the law is sought to be applied. If a party could not reasonably be expected to conform its conduct to the standards of a law of a particular state, then it would be fundamentally unfair to apply those standards to that party despite that state's interest in doing so. See the discussion of the constitutional stricture of fundamental fairness in Sedler, *supra* note 38, at 89–92.

Fairness, however, relates to foreseeability. The application of a state's law to govern a party's liability is fundamentally unfair only when such application was unforeseeable in the sense that the party conformed its conduct to or otherwise legitimately relied on the law of another state at the time that the party acted. But absent any unforeseeability in this sense, it is fully fair to apply the law of any state that has a real interest in having its law applied in order to implement the policy reflected in that law. For a further reply to Professor Brilmayer's "fairness" criticism, see Sedler, *supra* note 1, at 611–17.

interest analysis, Professor Brilmayer has completely ignored the basic premise of Currie's interest analysis—what I believe to be the most important justification for the interest analysis approach that Currie developed—that interest analysis provides a rational basis for making choice of law decisions.

Choice of law decisions, according to this premise, should be made with reference to the policies reflected in the laws of the involved states and the interest of each state, in light of those policies, in having its law applied on the point in issue in the particular case. The justification for interest analysis is that it is rational to make choice of law decisions on this basis, and that it is not rational to make choice of law decisions on a basis that does not assign primary importance to policies reflected in rules of substantive law and the interest of states in having their laws applied in order to implement these policies.

It is the rationality justification that supplies what Professor Brilmayer calls a foundation for the interest analysis approach to choice of law. While the rationality justification was indeed set forth by Currie,⁴⁶ I want to put it in my own words, since I refuse to be caught up in Professor Brilmayer's time warp. I also want to relate the rationality justification to experience with the interest analysis approach in practice in the years since Currie first developed the approach.

The justification for the interest analysis approach—the “foundation” of that approach, to use Professor Brilmayer's term—is that it provides a rational basis for making choice of law decisions. It is rational to make choice of law decisions with reference to the policies reflected in the laws of the involved states and the interest of each state, in light of those policies, in having its law applied on the point in issue in the particular case. Precisely because it is rational to make choice of law decisions on this basis, the application of the interest analysis approach in practice generally will produce functionally sound and fair results.

I would further submit that the rationality justification for the interest analysis approach has been empirically demonstrated by the application of the interest analysis approach in practice. As stated at the outset, my submission is that interest analysis is the preferred approach to choice of law because its application by the courts produces functionally sound and fair results in the conflicts cases that actually arise in practice. The reason that interest analysis works so well in practice is that it focuses on what seems to the courts to be the most rational consideration in making choice of law decisions: the policies reflected in a state's rule of substantive law and a state's interest in applying its law to implement those policies in the particular case.⁴⁷

We have thus come full circle. The justification for the interest analysis approach is that it provides a rational basis for making choice of law decisions. Currie advanced this proposition as a theoretical matter because he was advocating interest analysis as a completely new and revolutionary approach to choice of law. In the years since Currie first developed the interest analysis approach, this proposition has been demonstrated as an empirical matter by the results of the application of the interest

46. See *supra* note 18.

47. See the further discussion of this point in Sedler, *supra* note 1, at 635–43.

analysis approach in practice. If the courts are in fact applying interest analysis in practice (and I do not think this point can seriously be disputed⁴⁸), and if the courts generally are reaching functionally sound and fair results in the cases coming before them for decision (and neither Professor Brilmayer nor anyone else has demonstrated that they are not⁴⁹), then interest analysis must not be considered only as resting on a proper foundation, but also must be considered the preferred approach to choice of law.

Professor Brilmayer, in her attack on interest analysis as a “house without foundations,” has ignored completely what I believe to be its most firmly-rooted foundation, the rationality justification. I would now challenge her to turn her attention to this foundation. Let us see if she can demonstrate precisely why it is not rational to make choice of law decisions with reference to the policies and interests of the involved states, and why making choice of law decisions on this basis will not produce functionally sound and fair results in practice. I do not think that she can make such a showing, and unless she can, I submit that her “foundational attack” on interest analysis must fail completely.

48. *See supra* note 3.

49. As pointed out at the outset, Professor Brilmayer is not much concerned about the results that courts reach in practice. In fact, both in the present writing and elsewhere, Professor Brilmayer devotes little discussion to actual cases. Rather she tends to use hypothetical cases—which have not arisen in practice and which are not likely to do so—to demonstrate the alleged theoretical deficiencies in interest analysis.

